BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ARTHUR HARMAN
(Claimant-Respondent)

S.S.A. No.

ARDMOR CHEMICAL COMPANY
(Employer-Appellant)

Employer Account No.

PRECEDENT
BENEFIT DECISION
No. P-B-4
Case No. 67-4410

The employer appealed from Referee's Decision No. OAK-4621 which held the claimant was unemployed subsequent to June 24, 1967 within the meaning of section 1252 of the Unemployment Insurance Code. Written argument was submitted by the employer. Answering argument has not been received from the claimant.

STATEMENT OF FACTS

The claimant was last employed as general manager by the above-identified employer for a period of approximately five years. Sometime prior to June 1967 the employer decided to broaden its line of products which, in its opinion, would require a general manager with more technical knowledge than that possessed by the claimant. For this reason, the president of the company together with the treasurer met with the claimant on June 8, 1967 and informed the claimant he was being relieved of all responsibilities for the employer's operations effective that date. He was requested not to return to the employer's establishment after June 8, 1967 and performed no services for the employer subsequent to that date.

The employer advised the claimant he would be kept on the payroll at full salary through July 15, 1967, and that he would receive his two weeks' vacation pay from

the 15th through the 28th of July. The claimant was further notified his group health and life insurance would remain in effect through July 28, 1967.

The employer testified that the decision to continue the claimant on the payroll through July 15, 1967 was in recognition of the fact that the claimant "had done a good job basically, and we felt that he should have some time in finding a new location." The employer's earnings ledger shows the claimant was paid his normal salary on June 17, July 1, and July 15, 1967. On June 12 he was paid his vacation pay which was shown "ADV. VAC. 7/16 - 7/28/67." This advance vacation payment was made at the claimant's request because he needed the money immediately.

The claimant's testimony does not differ substantially from that of the employer except he contends he was told the five weeks' pay was severance pay. The employer denied that such statement was made and at the hearing before the referee contended the five weeks' pay was "in lieu of notice pay."

On or about September 6, 1967 the employer received a claim for group health insurance benefits from the claimant. The claim was for payment of a doctor's office visit by the claimant's son on July 26, 1967. The claim was processed for payment and paid. On the employer's portion of the claim form it was indicated the claimant's insurance was cancelled on July 28, 1967.

The employer has no written policy or established custom with respect to payment of severance pay, in lieu of notice pay, or other forms of pay when it dismisses an employee. Each situation is handled on an individual basis. There was no collective bargaining agreement covering the terms and conditions of the claimant's employment.

The claimant filed his claim for unemployment benefits in the Oakland office of the Department of Employment effective June 11, 1967, and informed the department of receipt of the two weeks' vacation pay and the additional five weeks' payment. In response to the Notice of Claim Filed the employer stated that the claimant ". . . will remain on our payroll through July 28, 1967

which includes vacation pay." The department determined that the vacation pay constituted wages which exceeded his weekly benefit amount and was allocable to the period immediately following termination of the claimant's employment. He was held ineligible for benefits through June 24, 1967. The department considered the five weeks' additional payment to be severance or dismissal pay and did not constitute wages.

The employer appealed to a referee from this determination, contending that the five weeks' payment the claimant received was wages. In his decision the referee held that the vacation pay the claimant received was wages but that the additional payments were dismissal or severance pay.

The issues in this case are whether the payments made to the claimant upon termination of the employment relationship constitute "wages," and if so, to what period should the payments be allocated.

REASONS FOR DECISION

Section 1251 of the Unemployment Insurance Code provides as follows:

> "Unemployment compensation benefits are payable from the Unemployment Fund to unemployed individuals who are eligible under this part."

Section 1252 of the code provides in part:

> "An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount."

We are here concerned with the period from June 11, 1967 through July 28, 1967. During this period the claimant performed no services, so the only question before us is the extent to which wages were payable to him

"with respect to" each of the weeks in that period. In a week with respect to which no wages were payable, or wages less than the weekly benefit amount, the claimant would satisfy the requirement in section 1251 of the code.

We first turn our attention to the contention of the employer that the payments made to the claimant during the period from June 11, 1967 through July 15, 1967 constituted "in lieu of notice pay." In our opinion, these payments were not wages in lieu of notice of dismissal in any meaningful sense because the claimant had no right to any notice of which the payments could be in lieu. A necessary characteristic of payments in lieu of advance notice is that there be a right to such advance notice, or at least such a custom as would give rise to an enforceable expectancy. It was not shown in this case that the employer made a regular practice of giving pay in lieu of notice or payment for the notice period as a matter of right (Jewell v. Colonial Theatrical Company (1910), 12 Cal. App. 681; 108 P. 527), nor was there a custom or pattern of doing so.

We consider next the claimant's contention that the payments were severance or dismissal pay and do not constitute wages.

The two leading cases in California relative to severance or dismissal pay are Bradshaw v. California Employment Stabilization Commission (1956), 46 C. 2d 608; 297 P. 2d 970, and Powell, et al. v. California Department of Employment (1965), 63 A.C. 99, 45 Cal. Rptr. 136. In the Bradshaw case, the court held that dismissal pay, required under the terms of a collective bargaining agreement, constituted wages and the claimant was not entitled to unemployment benefits during the period to which such wages were allocated. This decision was issued by the court in 1956 prior to the amendment of the Unemployment Insurance Code in 1959 when section 1265 of the code was enacted. The court in the Powell case stated, in effect, that since the legislature amended the Unemployment Insurance Code in 1959 by adding section 1265 of the code, the Bradshaw case was no longer controlling.

Section 1265 of the code provides as follows:

"Notwithstanding any other provisions of this division, payments to an individual under a plan or system established by an employer which makes provisions for his employees generally, or for a class or group of his employees, for the purpose of supplementing unemployment compensation benefits shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of payments under such arrangements or plans.

"This amendment is hereby declared to be merely a clarification of the original intention of the Legislature and is not a substantive change, and is in conformity with the existing administrative interpretation of the law."

The court in the Powell case stated in part as follows:

"The declaration of legislative intent contained in section 1265 obviously is sufficiently broad to include within its language the dismissal and severance payments . . . ."

In the Powell case, the claimant had received either "severance pay" or "dismissal pay" under the terms of a collective bargaining agreement. In concluding that severance pay or dismissal pay did not constitute wages, the court stated:

"In essence, respondents would draw a material distinction between the supplemental unemployment benefit plans and severance or dismissal pay on the basis of the label by which the additional benefits are described in the documents which provide for the benefits. But there would appear to be no reason why collective bargaining agreements which now provide for severance or dismissal pay could not be modified to give such payments a different label and concededly qualify the discharged employee for his full unemployment insurance benefits without doing violence to the integrity of the Unemployment Insurance

> Fund or any party involved. To resolve the issue according to the label attached, as respondents urge, would accord greater weight to form than to substance and such a resolution is not in keeping with the obvious legislative intent expressed in section 1265 to broaden the coverage of unemployment insurance benefits."

As we interpret the Powell case, the courts have equated severance pay or dismissal pay with the type of payments covered by section 1265 of the code. If such payments result from a plan or system or from the provisions of a collective bargaining agreement and are available to a class or group of employees, then the payments do not constitute wages.

However, that is not the case in the instant matter. It was not shown that the payments received by the claimant were the result of any plan or system or collective bargaining agreement, nor was there any showing that such payments were available to a class or group of employees. The payments in the present case were not made in a lump sum, usable immediately in their entirety like normal severance payments. They were paid in installments at the regular wage-payment times, as though the claimant's services had been continuing. The amounts were, therefore, clearly for the particular weeks for which similar wage payments would have been made on the same dates had the claimant remained in service.

We hold, therefore, that the payments in this case were not severance pay of the type before the court in the Powell case, nor supplemental unemployment benefits in the sense meant by section 1265 of the code. We are here considering another type of payment not previously identified in our decisions or those of the courts of this state. In view of the manner and purpose of these payments, we shall designate them for convenience as wage continuation payments. More important than the label, it is clear that each payment was made for the period in which services would have been furnished to earn a normal wage payment due at the time when the wage continuation payments were made. If the claimant had continued to provide services through July 15, 1967, he would have been paid on the dates and in the amounts that he received as wage continuation payments.

We conclude that these payments were made "with respect to" the period from June 11, 1967 through July 15, 1967, and that they constitute "wages" within the meaning of that word as used in section 1252 of the code, not being excluded by section 1265 or the Powell decision. It follows that, since the amount paid with respect to each week in the period last mentioned exceeded the claimant's weekly benefit amount, he was not "unemployed" during that period within the meaning of section 1251 of the code.

In Shand v. California Employment Stabilization Commission (1954), 124 Cal. App. 2d 54, 268 P. 2d 193, a California District Court of Appeal held that a vacation payment, made at the termination of employment, was paid with respect to the period after termination of employment as though the claimant had been told to take the vacation to which he was entitled, and then dismissed. The claimant there was entitled to such paid vacation, but not to payment without vacation during continued employment. The situation now before us appears to be substantially the same. When entitlement to vacation with pay is fully earned but the pay cannot be obtained without taking the vacation, payment for this vacation entitlement at termination of employment is paid with respect to a period following termination of employment.

When several types of payment are made with respect to periods following employment, they ordinarily are paid with respect to periods following one another. Here, we therefore conclude that the vacation payments were made with respect to the two weeks following the period of wage continuation payments. Again, these vacation payments exceeded the weekly benefit amount during this time.

The claimant, therefore, was not an unemployed person as that term is used in section 1251 and defined in section 1252 of the code during the period ending July 28, 1967. During this period he was thus ineligible for unemployment benefits under section 1251.

We are not here concerned with whether or not the employment relationship ended before or after the wage continuation period. Under section 1276, a valid claim may be filed "subsequent to the termination of the

performance of services," "even though wages, as defined in section 1252," are payable for the week in which the claim is filed; and, as we have seen, the relevant considerations under sections 1251 and 1252 are whether services are performed during, or wages payable with respect to, the period in question, regardless of whether for some other purpose or in some other respect the employment relationship does or does not continue.

DECISION

The referee's decision is modified. The claimant is ineligible for benefits under sections 1251 of the code from June 11, 1967 through July 28, 1967.

Sacramento, California, February 15, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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